No. 11,765

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE THOMAS,

Appellant,

vs.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,

Appellees.

BRIEF FOR APPELLANT.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
HERBERT RESNER,
240 Montgomery Street, San Francisco,
Counsel for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Codes

Other Authorities

No. 11,765

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE THOMAS,
Appellant,

vs.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,
Appellees.

BRIEF FOR APPELLANT.

I.

STATEMENT.

This is an appeal by George Thomas, longshoreman, from an order of the District Court of the United States, Northern District of California, Southern Division, granting motion for summary judgment in favor of defendant-appellee Furness (Pacific) Limited (hereinafter referred to as Furness), and dismissing his complaint with prejudice as against said defendant-appellee, and also an appeal from an order granting a motion to quash service of summons as against defendant-appellee Shaw, Savill & Albion, Ltd. (hereinafter referred to as Shaw) and dismissing

with prejudice the complaint as against said defendant-appellee. (R. pp. 28-31.) The orders were made on May 2, 1947, and notice of appeal was filed on July 5, 1947. (R. 31.)

II.

JURISDICTION.

(1) The District Court had jurisdiction pursuant to 28 USCA 41(1) (*Judicial Code* § 24 amended), the action being based upon diversity of citizenship and the amount in controversy exclusive of interests and costs exceeding $3,000.

(2) The Circuit Court has jurisdiction to entertain this appeal pursuant to the provisions of 28 USCA 225 (§ 128 *Judicial Code*).

III.

PLEADINGS.

George Thomas, longshoreman, filed his complaint for damages against Furness (Pacific) Limited in the Superior Court of the State of California in and for the City and County of San Francisco. (R. 2-7.) Thomas alleged that he was a longshoreman in the employ of the San Francisco Stevedoring Company and that on May 21, 1946, he was working aboard the British vessel SS Fordsdale, which was then docked at Encinal Terminals, Oakland, California. He was working at the No. 1 hatch as a winch driver. It was

night time and dark. He alleged that the winches at that hatch leaked oil and therefore were unseaworthy. He alleged that there were insufficient lights in the vicinity of No. 1 hatch, rendering the vessel unseaworthy. He alleged that both with regard to the winches and the absence of lights, and the fact that oil was permitted to accumulate on the deck where he was working from the faulty winches constituted negligence of defendant.

He alleged that he was caused to slip and fall because of the oil leaking from the winches and the fact that it was too dark to see where he was working, as the result of which fall he sustained severe injuries to his back and right hip, and other injuries for which he claimed damages in the amount of $25,000.

He also claimed loss of wages due to his inability to work because of said injuries in the amount of $800 at the time of filing his complaint, and also for damages on account of doctor and medical bills in an unspecified sum in order to treat his injuries.

Thereafter the action was removed to the District Court on motion of Furness. (R. 8.)

Thereupon Furness made a motion for summary judgment (R. 9) supported by the affidavit of James West, manager of Furness (R. 11). It was Furness' position in support of this motion, as shown by the affidavit of Mr. West, that it was only the agent for the Fordsdale and therefore was not liable to Thomas for his injuries.

Thereafter on motion of appellant Thomas, made pursuant to Rule 21 of the Federal Rules of Civil Procedure, Shaw, Savill & Albion, Ltd., owner of the vessel, was added as a party defendant. (R. 13-17.)

Thereafter appellant Thomas filed his first amended complaint for damages (R. 17-22), the only difference between the amended complaint and the original complaint being that in the new complaint Shaw was added as party defendant.

Thereafter Shaw made a special appearance and motion to quash service of summons upon it, said summons having been served on James West, general manager of Furness. (R. 23.)

In support of its motion to quash service of summons an affidavit was made by James West on behalf of Shaw (R. 25), stating that this company had its principal office in London, England, and did not have vessels calling regularly in California ports. Allegations were made with regard to the Fordsdale which will be referred to later.

A hearing was held on these motions before the Court below, wherein Mr. West was examined and certain testimony elicited and various documentary proofs received into evidence. Another witness, Walter Bell, Longshoremen's Union official, testified at this hearing. Thereafter the Court below made its orders in behalf of defendants noted above, and this appeal followed.

IV.

THE EVIDENCE.

Mr. James West testified that he was Pacific Coast Manager of Furness, which company does not operate any of its own vessels but "acts as agents for any number of shipowners, any one of whom might appoint us to act on their behalf to load or discharge vessels". (R. 38.)

Furness is a Canadian corporation which operates agencies in San Francisco, Los Angeles and Vancouver (R. 38) but does business along the entire Pacific Coast. (R. 40.)

Furness has never designated an agent for service of civil process in California. (R. 39.) Furness is affiliated with Furness-Withy & Company, Limited, of New York and London (R. 40-41), and policy for Furness (Pacific) on the Pacific Coast is made by Furness-Withy of New York. (R. 41.) On some occasions Mr. West got instructions directly from his principals in London. (R. 41.)

On April 4, 1946, the Fordsdale entered San Francisco Harbor, at which time she was on time charter to the British Government Ministry of War Transport. (R. 42-43.)

On April 24, 1946, Furness took delivery of the Fordsdale for and on behalf of her owners, Shaw, appellee herein (R. 43.) Instructions to Furness to take over the Fordsdale came from Shaw. (R. 47.)

The Fordsdale was on the Pacific Coast from April 4, 1946, until May 26, 1946, when she departed Los Angeles for Great Britain with cargo. (R. 43.)

On April 25, 1946, the day after Furness took delivery of the vessels for her owners, Shaw, the vessel proceeded to Portland, Oregon, to load cargo, returning to San Francisco Harbor and mooring at Encinal Terminals on May 18, 1946. (R. 43.)

Cargo was loaded at Encinal Terminals between May 18 and May 22. (R. 43.)

We have noted that Mr. Thomas was injured on May 21, the day before the vessel departed San Francisco.

On May 24-25 the vessel loaded cargo at Los Angeles (R. 43) and then departed for Great Britain.

Furness made and carried through all arrangements for the handling of the Fordsdale on the Pacific Coast after accepting delivery of the vessel for the owners.

Counsel for defendants stipulated "we are willing to stipulate that Furness (Pacific) Limited made all of the arrangements for this vessel that were necessary on this coast. (R. 59.)

In this connection Furness obtained the certificates of seaworthiness for the Fordsdale (R. 48-49); arranged for repairs (R. 53-55); paid the repair bills on behalf of the owners (R. 55); arranged for and paid for the stevedoring of the ship (R. 55); made detailed instructions for the loading of the ship in collaboration with the ship's master (R. 57); arranged for her berthing and generally took care of

all of the business of the vessel while she was on the Pacific Coast. (R. 63.)

Mr. West testified that the responsibility of his company was "to take care of the ship and its cargo on behalf of the owners of the ship; when I say take care of the ship, I mean the repair of the ship, loading of cargo or the discharge of cargo, and everything attendant thereto". (R. 64.)

Mr. West testified "actually the ship was in our care and custody you might say from April 24 to May 26". (R. 64.)

Mr. West testified that Furness Withy & Company "communicated directly with Shaw, Savill & Albion in London to secure for its San Francisco office the agency for the Fordsdale while she was on the Pacific Coast". (R. 50.)

Much documentary evidence was introduced, as the record will show, indicating the very close connections between Furness (Pacific) and Furness Withy, and between these two concerns and Shaw, in connection with the matters which are the subject matter of this action.

Mr. West testified that his company was a member of the Waterfront Employers Association of the Pacific Coast. (R. 65.)

Mr. West testified that he communicated directly with Furness Withy, and Furness Withy communicated with Shaw concerning the accident to Mr. Thomas. (R. 61-62, 71.)

Walter Bell testified on behalf of appellant that he was an officer of the Longshoremen's Union, which had a contract with the Waterfront Employers Association, of which Furness (Pacific) was a member. (R. 74.)

Under this contract the longshoremen were compelled to work as directed all vessels for member companies, including all foreign vessels in San Francisco Harbor. (R. 78-79.) If any unsafe conditions exist aboard ship the longshoremen are to continue working until the matter can be adjusted through the grievance machinery provided by the contract (R. 81-82), unless the conditions are so hazardous that the longshoremen in good faith may refuse to work until the matter can be settled.

(See Agreement between International Longshoremen's & Warehousemen's Union and Waterfront Employers Association of the Pacific Coast, plaintiff's Exhibit 10 for identification, R. 77, Section 11.)

Mr. Bell testified that the longshore industry was very hazardous and that many accidents occurred. (R. 83.)

On many occasions foreign ships came into San Francisco Harbor and were never seen again. (R. 82.) The docks which these ships used are state owned on the San Francisco side of the bay and municipally owned on the Oakland side of the bay. (R. 82.)

V.

QUESTIONS FOR DECISION.

(1) Under the facts and circumstances of this case, was Shaw, Savill & Albion, Ltd., a British shipowner and owner of the Fordsdale, subject to the jurisdiction of the Court below for a maritime tort committed by that vessel while she was within the jurisdiction of the Court below so as to be subjected to that jurisdiction by service of ordinary civil process upon Furness (Pacific), its agent?

(2) Was service upon the General Manager of Furness (Pacific), agent for Shaw, good and sufficient service upon Shaw, and did such service subject Shaw to the jurisdiction of the Court below?

(3) Under the facts and circumstances of this case, was Furness suable for the maritime tort in question, and should that company, as agent for Shaw, be compelled to answer and defend on the merits?

VI.

ASSIGNMENTS OF ERROR RELIED UPON.

Appellant relies upon all of the errors which he assigns herein. (R. 86-88.)

Assignment of errors Nos. 3, 4, 5, 6, 7, and 9 are discussed under Point A following.

Assignment of errors Nos. 1, 2, 5, 6 and 8 are discussed under Point B following.

Assignment of errors Nos. 1, 2, 5, 6 and 8 are discussed under Point C following.

VII.

SUMMARY OF ARGUMENT.

In this case we have Shaw, a British shipowner, bringing one of its vessels into California waters, and keeping her here for a period of several weeks. Altogether the vessel was on the Pacific Coast for a period of approximately a month and a half. While in California, and particularly while in San Francisco Bay, with which events we are particularly concerned here, the SS Fordsdale made use of California facilities, namely, docks, loading facilities, police and fire protection, customs, repair facilities, *and particularly stevedoring facilities.*

In connection with the use of these services, and particularly the use of the stevedoring facilities, a longshoreman, appellant Thomas herein, was injured. It is our contention that Shaw, by its conduct and by the use of the facilities noted, subjected itself to the jurisdiction of the Court below for torts committed by it locally in connection with the very services which it solicited locally, in this instance the stevedoring service. By this conduct we argue that Shaw subjected itself to being reached by ordinary civil process, service of which was made upon its General Manager in California, James West, Manager of Furness, the owner's agents. In other words, having solicited and used facilities in the San Francisco area, Shaw is liable for torts committed by it in the use of those facilities and has in effect thereby consented to be sued and be reached by ordinary civil process in connection with such maritime torts.

Furthermore, having designated Furness as its agent for all purposes, and the agent having performed a variety of services, in fact all that were necessary in connection with the handling of a ship on the Pacific Coast, Shaw has in effect agreed that service of ordinary civil process upon this agent shall be and constitute a good and valid service upon it so as to subject it to the jurisdiction of the Court below. Having received the benefits of our waters, docks, police and fire protection, repairs, *and longshoremen,* the foreign shipowner has agreed to the burdens of being liable for torts committed by it while enjoying those benefits, and has in effect agreed to respond for such torts when its designated agent has been served.

More than this, the record discloses that Furness performed services of such a nature for the vessel that it, too, is liable for the vessel's maritime torts committed in this jurisdiction and therefore should answer and defend on the merits.

VIII.

ARGUMENT.

A. A FOREIGN SHIPOWNER SUCH AS SHAW, UNDER THE FACTS DISCLOSED BY THE RECORD IN THIS CASE, IS SUBJECT TO THE JURISDICTION OF LOCAL COURTS FOR MARITIME TORTS COMMITTED BY ITS VESSELS WITHIN THAT JURISDICTION AND CAN BE REACHED BY THE SERVICE OF ORDINARY CIVIL PROCESS UPON ITS DESIGNATED AGENT.

Admittedly Shaw could be reached by a libel *in rem* against its vessel, or foreign attachment against its funds and property, if a claimant knew of the presence of such vessel or existence of such funds or property within the jurisdiction. This being so, can such a foreign shipowner escape jurisdiction from ordinary civil process when service is made upon its designated agent under the facts disclosed here?

It has been noted that this action was filed in the state Court originally, and removed upon motion of the defendants based upon diversity and a sum in excess of $3,000 to the District Court. The removal brought the action to the law side of the Court.

Nevertheless, the cause sounds in maritime tort and therefore the maritime rules apply. As this Court stated in *Hall-Scott Motor Car Co. v. Universal Insurance Co.* (CCA 9), 122 Fed. (2d) 531, at page 534:

> "* * * The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."

Accord:

Chelantis v. Luckenbach SS Co., 247 U.S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171;

Union Fish Co. v. Erickson, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261;

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159, 161, 40 S. Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 259, 42 S. Ct. 475, 477, 66 L. Ed. 927;

Puget Sound Navigation Co. v. Nelson, 41 F. (2d) 536, 59 F. (2d) 697.

Most recently this rule has been announced by the Supreme Court in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099. The Court said (90 L. Ed. 1103):

> "* * * It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court."

The rules which apply in maritime cases are enforced on the law side of the Court in the same way and with the same effect as though the action were brought in admiralty.

Garrett v. Moore-McCormack Co., 317 U. S. 239, 249, 63 S. Ct. 246, 87 L. Ed. 239;

Southern Pacific Co. v. Jensen, 244 U. S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086.

These rules are followed by the state Courts.

See:

Intagliata v. Shipowners & Merchants, etc., Co., 26 Cal. (2d) 365, 371,

where the Court said:

> "It is now settled that the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court, and *the state courts must preserve all substantial admiralty rights of the litigants. State courts* having the same jurisdiction over a case that a federal court would have if the suit had been brought there *must determine the rights of the parties under the maritime law* as a 'system of law coextensive with, and operating uniformly in, the whole country.' " (Emphasis ours.)

It is our contention that jurisdiction would exist in admiralty as against Shaw under the facts disclosed by this record. Unquestionably we could reach Shaw by libel *in rem* or foreign attachment were any of her vessels or funds within the jurisdiction. This being so, why should a difference be made with regard to reaching Shaw by ordinary civil process on the law side?

Shaw's argument whereby it would escape the jurisdiction of the Court below is based upon a claim of due process of law. The original notion that personal service must be obtained in an action *in personam* in order to support jurisdiction was based upon considerations of fairness. In other words, in order to subject a party to the Court's jurisdiction it was thought that this person ought to be within the jurisdiction of the Court.

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Since *Pennoyer* however statutes providing for substituted service, whether by publication or other

means, have been held consistent with ideas of due process of law.

As the United States Supreme Court said in *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 95, at 90 L. Ed. 102:

> "* * * due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Thus in our case there can be no question but that Shaw had complete knowledge of the injury to Thomas; West so advised them and had correspondence about the accident. (R. 61-62, 71.) Notice to Furness was certainly notice to Shaw. The record discloses the very closest relation between them in connection with the services to the Fordsdale. No unfairness attaches to subjecting Shaw to the jurisdiction of the Court in this case, where the purpose of such jurisdiction is to compel Shaw to respond for a tort committed within the jurisdiction, particularly where, as here, Shaw has full knowledge and can respond as easily here as anywhere else. This is more eloquently so from the standpoint of justice, because this is the only forum where plaintiff can reach Shaw.

Shaw argues that it is not present in California and was not present at the time of the tort, but presence in the legal sense has no mystical qualities and it

cannot be used as a shield to avoid an otherwise existing responsibility. As the Court said in the *International Shoe Co.* case, supra, 90 L. Ed. at 102:

> "* * * it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."

It is conceded in our case that Shaw carried on no business before the arrival of the Fordsdale and has carried on none since the departure of that vessel unless the winding up of the company's business by Furness on August 10, 1946, be considered a continuance of business. But that is not important. The activities which Shaw carried on while the Fordsdale was here are sufficient to subject her to ordinary civil process and constitute sufficient "presence" for the purposes of this case. It must be remembered that we do not seek here to impose any tax liability or any long continuing obligations upon Shaw. There is sought to be imposed here responsibility only for the events which occurred when and arose out of Shaw's bringing the Fordsdale into San Francisco waters.

A case practically identical to ours is *Oro Navigation Co. v. Superior Court,* 82 A.C.A. 1017 (hearing denied by the California Supreme Court on February 9, 1948). In the cited case a Greek shipowner had a vessel, the SS Telfair Stockton, in California waters only on the one occasion. Plaintiff seaman was injured in the service of the ship and brought suit against the company in the California Courts. The shipowner sought prohibition against the Superior Court, seeking to enjoin further proceedings in the case after Oro's motion to quash service of summons (comparable to Shaw's motion here) had been denied by the trial Court. The California Court held that Oro was present in California and subject to ordinary civil process because the tort which gave rise to the action occurred at a time when its vessel, the Telfair Stockton, was on the Pacific Coast and the company at that time was present in San Francisco. The case was one where Oro operated in San Francisco through its agents, General Steamship Company, a situation very comparable to ours where Shaw operated through Furness.

In the *Oro* case the California Court stated, 82 A.C.A. 1021:

> "Service of process upon a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute. *(Doe v. Springfield Boiler & Mfg. Co.,* 104 F. 684 [44 C.C.A. 128].) Judicial decisions often express this rule by stating that the cor-

poration must 'be present' within the jurisdiction where service is made at the time of service. 'Presence' does not necessarily refer to the state wherein the articles of incorporation were filed, the location of the corporation's residence in directing the conduct of its business or the main site of operating activity. 'Presence' means transacting business which is not merely an isolated transaction. *(International Shoe Co. v. Washington,* 326 U. S. 310 [66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057].) *Likewise, the transaction should have a relation to the purpose for which the corporation was formed.* Whether the corporation is 'present' after a discontinuance of some former activity ordinarily presents a question of fact to be determined by established rules of law controlling within the jurisdiction where the foreign corporation was served. In this case the laws of California are applicable." (Our emphasis.)

In the *Oro* case the California Court construed former California Civil Code Sections 411, 406(a) and 405, providing for the means of obtaining service on foreign corporations. (These sections are now in the California Corporation Code.) Those statutory provisions are applicable and must be followed by the Court below in determining whether a good service was made upon Shaw by service upon Furness.

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

Thus in *Erie,* the Court said:

"* * * the federal courts exercising jurisdiction in diversity of citizenship cases would apply as

their rules of decision the law of the state, unwritten as well as written."

Thus this very circuit has construed California Civil Code, Section 411, in the same fashion as the section was construed in the *Oro* case.

Premo Specialty Mfg. Co. v. Jersey-Creme Co., (C.C.A. 9), 200 F. 352.

Thus the Court stated in the *Oro* case, also pertinent here, at 82 A.C.A. 1025:

"A statute authorizing a means of service upon a sovereign corporation which has transacted business in a state and then departed, if the action arises out of such business and the process is served prior to the expiration of the statute of limitations, is valid. The basis of such decision is that persons who have transacted business should not be precluded from enforcing a corporate liability by the withdrawal of the corporation from the state."

It may be argued that in the *Oro* case plaintiff Anderson was a seaman, while here appellant Thomas is a longshoreman. However, the rules are the same with regard to shipboard accidents. Thus in *Sieracki,* supra, the Court stated at 90 L. Ed. 1108:

"Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters*

> *the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.* For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship." (Our emphasis.)

It is therefore clear that Shaw would suffer a minimum of inconvenience by being subjected to jurisdiction in the Court below and that the interests of justice would be served by giving to the injured longshoreman Thomas a forum and his day in Court. Otherwise he is entirely bereft of remedy.

This is not like the case where it might be possible to reach a foreign corporation elsewhere in this country. It is not possible for appellant to reach Shaw abroad.

The argument could be offered that Shaw could not be compelled to respond to any judgment since it lacks funds in the jurisdiction, but is not the answer to that question to subject Furness to liability on behalf of Shaw? Furness, having accepted the benefits of Shaw's business certainly should be held accountable for Shaw's acts, and between themselves it is not unreasonable that Shaw and Furness will work out the question of financial responsibility should plaintiff prevail after a trial on the merits.

After all there would have been no purpose for the correspondence between Furness and Shaw on the question of Mr. Thomas's case had they not recognized the fact that financial responsibility would have to be worked out and indeed would have been worked out in the case had jurisdiction prevailed.

Particularly in maritime cases like this, where foreign shipowners are involved, it is our contention that the agent should be made equally responsible with the foreign owner and that service on the agent of ordinary civil process shall be considered valid service on the foreign owner. Dictates of justice and of sound maritime policy require this result. Otherwise, a longshoreman such as plaintiff, while serving the industry in which the foreign shipowner and his local agent benefit, would be left without remedy and protection or rights to which he is otherwise entitled. It is a very simple matter for the foreign shipowner and its agent to work out the question of responsibility.

As the Supreme Court said in *Sieracki,* 90 L. Ed. 1106:

> "* * * The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. * * * Moreover, his ability to *distribute the loss over the industry* is not lessened

by the fact that the men who do the work are employed and furnished by another."

There are many other cases which are helpful on the proposition that Shaw was sufficiently present in California to subject it to ordinary civil process by service on its agent Furness. Thus in *Hayward v. Matson Navigation Co.,* (DC ND Ill.) 1942 A.M.C. 705, holding that the Matson Navigation Company, a California corporation, could be sued in Illinois by service on its ticket agency in Chicago, the Court holding that the selling of tickets in Chicago was sufficient basis to determine the Matson Company as doing business in Illinois.

Socony-Vacuum Oil Co. v. Superior Court of California, (DC Cal.) 1939 A.M.C. 1500, 35 Cal. App. (2d) 92,

where it was held that occasional visits by Socony's vessels in California constituted doing business in the state, and where it was held that service upon an agent of the company here, although not specifically appointed by Socony for that purpose, constituted a good service.

There are a great number of cases holding that the admiralty court in its discretion will accept jurisdiction in cases involving foreign seamen and vessels, since other forums are not available to them. See for example:

"The Prahovo," 1941 A.M.C. 694, (DC SD Cal.)

allowing jurisdiction in the case of Roumanian seamen's claim for wages as against a Roumanian vessel.

Kriakos v. Polemis, (DC SD NY), 53 F. Sup. 715, aff. (C.C.A. 2) 151 F. (2d) 132,

allowing jurisdiction of an action under the Jones Act by a Greek seaman in connection with injuries arising out of service aboard a Greek vessel as against her Greek owners. The Court speaking through District Judge Bright, said (p. 716):

> "At the time of the assault, the ship had not left the territorial waters of the United States. Under the special circumstances existing, because of the war conditions and the probability that in no other place can this libelant obtain relief, if he is entitled to any, the motion is denied."

See also:

Carletto v. Italian Lines, (N. Y. S. Ct.) 1942 A.M.C. 867;

McGhee v. U. S., (C.C.A. 2) 154 F. (2d) 101;

Brewer v. American President Lines, (D. C. S. D. N. Y.) 1941 A.M.C. 30,

holding that an American court may take jurisdiction of a group of ten libels against a Canadian ocean carrier in respect of cargo damage on non-American voyages, where it appears that seven of the libelants are American, and the convenience of witnesses would be no greater in Canada than here.

Simpson v. Hamburg-American Line, (DC C.Z.) 1939 A.M.C. 1469,

where the plaintiff was a citizen of the Republic of Panama and the defendant was a German corpora-

tion, where the complaint was dismissed but where the Court said at page 1481:

> "* * * the courts of the United States will not take jurisdiction unless there are special circumstances, and such special circumstances are usually where the voyage has ended, or the seamen have been dismissed, or treated with great cruelty, etc., or where it would be an especial hardship upon the seamen if the court did not take jurisdiction."

See also *Burr v. Pacific Tankers, Inc.,* 1947 A.M.C. 794, particularly at page 796 where the Court said:

> "There is no question but that the defendant was engaged in interstate commerce, and, being a foreign corporation, could not be compelled to qualify to do business in the State of Oregon under the statutes of this state respecting foreign corporations; but this fact in and of itself does not prevent the defendant from being subject to the jurisdiction of the courts of this state. That fact would simply prevent the state from exacting a license or charging the defendant a fee to enable it to transact business within the state. Despite the fact that the principal business of the defendant is transportation, and interstate in character, if the defendant is within this state by its agents or officers and is doing business within the state, it is subject to the jurisdiction of the courts of the state. And the action here being of a transitory nature, it is immaterial where the cause of action arose or where the plaintiff may have his domicile."

And again at page 797:

> "Insofar as the issue now before this court is concerned, the court is of the opinion that the defendant actually has been and is actively engaged in doing business within this state.
>
> "In 14-A *Corpus Juris,* at page 1381, is found the following statement:
>
> " 'A foreign corporation is doing business in the state so as to be subject to the jurisdiction of the courts thereof when as a common carrier it is operating trains between points in the state or boats to and from a port in the state.' "

The Oregon court was considering substantially the same point we have here, namely, that while a foreign corporation could not be compelled to qualify to do business in the state, nonetheless it was *present within the state and liable to suit therein for events which occurred in connection with that presence and business in the state.*

The whole philosophy of the law is moving in the direction of subjecting to jurisdiction within a state those who do any kind of business within the state which results in the creation of legal liabilities. All of the statutes designed for substituted service on non-resident motorists are based on this philosophy.

Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632;

Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 S. Ct. 30.

When we bear in mind all of the facts and circumstances here involved, and particularly that this is a

maritime case where the peculiar and special rules of admiralty apply and where it has always been the policy of the maritime courts to subject to jurisdiction those liable for wrongful acts, we conclude that the dictates of sound judicial discretion, as well as of sound maritime policy, require a finding that Shaw was present sufficiently to subject it to the jurisdiction of the Court below by the service of ordinary civil process upon its agent Furness.

B. SERVICE OF CIVIL PROCESS UPON AN AGENT OF SUFFICIENT DIGNITY TO GIVE ITS FOREIGN CORPORATION PRINCIPAL NOTICE OF THE EXISTENCE OF AN ACTION AGAINST THE PRINCIPAL IS SUFFICIENT TO BRING THE PRINCIPAL WITHIN THE JURISDICTION OF THE COURTS.

The evidence as reviewed in this case shows the very close connections between Furness and Shaw; shows that Shaw had knowledge of everything that Furness did; that Shaw had knowledge of the very accident to Thomas. There can be no question of unfairness here because Shaw has had notice all along the way and Mr. West, as General Manager of Furness in California in effect was General Manager of Shaw for the business conducted by Shaw through the Fordsdale in California. The service upon Mr. West therefore was a good and sufficient service within the meaning of Rules 4(d)(3) and 4(d)(7) of the Federal Rules of Civil Procedure. Service was sufficient within the meaning of California Code of Civil Procedure Sections 411, 406(a) and 405.

The point made in the cases about service on an agent, where no officer of the corporation is present in the state, is that the agent must be of sufficient stature so that notice is likely to be given to the principal. We have seen that there can be no question about that in this case. The following cases support our contention that service upon Furness (Pacific) was service upon Shaw.

Socony-Vacuum Oil Co. v. Superior Court, supra, 35 Cal. App. (2d) 92, at 94,

where the Court said:

> "Moore was an agent of the petitioner corporation, managing and controlling generally whatever services any of the ships of the petitioner corporation might require in loading or reloading. He was a general manager in California as distinguished from one in charge of a branch or department in a particular district, * * * and his position with petitioner corporation was of sufficient character and rank to make it reasonably certain that the corporation would be apprised of the service of summons * * *"

Thew Shovel Co. v. Superior Court, 35 Cal. App. (2d) 185;

Milbank v. Standard Motor Construction Co., 132 Cal. App. 67;

Quinn v. Southgate Nelson Corp., (C.C.A. 2) 121 F. (2d) 190.

And particularly important is *Premo Specialty Mfg. Co. v. Jersey-Creme Co.,* supra, construing and applying California Code of Civil Procedure § 411 and saying:

"The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other class of agents the one upon whom service should be made, *in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason why the foreign corporation doing business within the jurisdiction under such circumstances should not be bound by such a service.* (Our emphasis.)

Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569;

St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222;

Henrietta Mining Co. v. Johnson, 173 U. S. 221, 19 S. Ct. 402, 43 L. Ed. 675.

So also as noted in the *Oro* case, supra, service of process upon a Mr. Reeves, Secretary of General Steamship Company, was held to be a good service upon the foreign corporation shipowner. The position held by Mr. West in our case is exactly comparable to that of Mr. Reeves in the *Oro* case; the relationship of Furness in our case is the same as that of General Steamship in the *Oro* case; and the relationship of Shaw is the same as that of Oro in the *Oro* case. It seems to us then that the ruling in the *Oro* case with regard to service of civil process is controlling in our case.

C. FURNESS (PACIFIC) AS AN AGENT IS LIABLE FOR ITS OWN TORTS.

Under any circumstances Furness cannot escape from the case, because the complaint (Paragraph V) alleges that the defendants "negligently and carelessly failed to safely and properly maintain the vessel, her winches, appurtenances, gear and lighting facilities" and that the defendants (which includes Furness) were guilty of the negligence which caused plaintiff's injury.

Obviously, an agent is responsible for its own torts, and this is independent of any liability on the part of the principal. The liability of the agent presents a question of fact which can be determined only on a trial and not on any motion for summary judgment, or on a motion not concerned with the merits of the case.

That an agent is liable for its own torts in a case of this character and should defend on the merits has been held consistently by the United States Supreme Court.

Brady v. Roosevelt SS Co., 317 U. S. 575, 87 L. Ed. 471, 63 S. Ct. 425,

where the Court said at p. 580:

"The liability of an agent for his own negligence has long been imbedded in the law."

Hust v. Moore-McCormack SS Co., 328 U. S. 707, 90 L. Ed. 1534, 66 S. Ct. 1218, 1946 A.M.C. 747;

Quinn v. Southgate Nelson Corp., supra.

Under the circumstances revealed here Furness could be found to be responsible for the conditions which resulted in Thomas's accident. A very meager record shows it arranged for repairs of the ship, berthed the ship, arranged for loading the ship, and did many other things. In those connections Furness could be held liable for failing to have the place where the longshoremen worked in good condition, particularly when Furness was the concern which arranged for the employment of these longshoremen and therefore should be held accountable for providing for them a safe place to work.

Cf. Seas Shipping Co. v. Sieracki, supra.

Under any circumstances of the case Furness should not have been dismissed with prejudice and thereby escape liability which could be found against it after a hearing on the merits.

CONCLUSION.

We respectfully submit that the orders appealed from are in error and that the case should be reversed and remanded to the Court below, with instructions to compel appellees to answer and defend on the merits.

Dated, San Francisco,
April 26, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
HERBERT RESNER,
Counsel for Appellant.